This is the only statement in the 1950 legislative record that supports the inference that subsections 793(d) and (e) are designed to put criminal sanctions behind the classification program. Apart from this interesting remark, the remainder of the House debates touched on only two aspects of the 793 revision. First, the speakers seem clearly to have understood that the culpability requirement of subsections (d) and (e) were different from the requirements of the preceding subsections. Confusion existed, however, as to what exactly the culpability standard of (d) and (e) was.[271] Second, subsections (d) and (e) *in tandem* were thought to cover everyone. Virtually nothing was said in the House about whether this meant that its coverage extended to newspapers, although Congressman Bryson called attention to "unfounded" fears that the bill would make newspaper and reporters "criminals" without their doing any wrongful act, and referred the House to Senator McCarran's published exchange of correspondence which "answered objections of this nature."[272]

What does the legislative history of the 1950 amendments amount to? Through all the confusion and inattention to basic questions, two general themes emerge. First, fears that the new subsections 793(d) and (e) might make criminal actions taken by newspapers in "the normal course of their operations" were rebutted by statements by the Attorney General and by the Legislative Reference Service, neither of which was supported by plausible interpretation of the statutory language. More important, these fears led to the re-introduction of the anti-censorship provision, which apparently was designed to meet concerns about the breadth of the 793 provisions of S. 595. While a literal interpretation of this proviso may construe it as only a caveat against prior restraints, its role in the legislative history reflects a broader purpose. The anti-censorship provision and the interpretations solicited by Senator McCarran left Congress with an amorphous belief that 793(d) and (e) were not sweeping prohibitions against newspaper publication of information relating to the national defense. No analytical basis for a narrower reading was suggested, however, and the legislative history thus leaves open the question of how the statute is to be accommodated to the legislative intention.

The second current running through the 1950 deliberations was the notorious activities of Whitaker Chambers, Alger Hiss, and Henry Julian Wadleigh. Their revelation and retention of sensitive information were repeatedly cited as evidence of the necessity of "closing the loopholes" in the espionage statutes. Thus, the retention offense was extended to non-government employees, such as Whitaker Chambers, without necessity for an official demand. Furthermore, the statute of limitations for all 793 and 794 offenses was ex-

271. *See, e.g.*, the comments of Cong. Tackett, *id.* at 3408.
272. *Id.* at 5494.

tended from three to ten years.[273] But beyond these two extensions of section 793, it is not at all clear what Congress intended to accomplish through the communication offenses of subsections (d) and (e). The Attorney General wrote of the need to reach a State Department employee who abstracted documents for delivery to a foreign government. Chairman Celler mentioned that it must be made illegal to obtain and disseminate classified data "to our grave discomfort and with danger to our security."

No one spoke of the government employee or ordinary citizen who gives defense information to a newspaper in the belief that the benefits of public debate on the matter outweigh any danger to national security. The focus, rather, was on employees who deliver government documents to communist study groups or Russian agents, and on others who are part of an espionage apparatus. These activities, however, fit easily into the established culpability framework of the espionage statutes, in that a purpose to injure the United States or advantage a foreign country could be inferred. Why, then, do the communication and retention offenses adopted in 1950 call for a lesser culpability standard that would presumably be met by general publication of defense information? Furthermore, 793(d) and (e) would appear to reach retention of defense information by publishers and communication of such information in the first instance from a source to a newspaper.

The 1950 legislation thus follows the frustrating pattern of so many of the espionage statutes: Congress said it, but seems not to have meant it. What are the courts and others concerned with the interpretation of these statutes to do?

E. *Subsections 793(d) and (e): Conclusion*

Cynics have claimed that if courts enforced only those criminal laws which legislatures understood, Title 18 of the United States Code would be a dead letter. Although courts should not condition the enforceability of statutes on legislative prescience about all their possible applications, the problems with subsections 793(d) and (e), go well beyond tolerable limits. At least five serious problems of statutory construction must be resolved before these laws can be applied:

(1) Is publication a "communication" within the meaning of the subsections, and are communications or retentions incident to publication criminal?

(2) What degree of culpability is required by the term "willfully?" Can the word be given a meaning narrow enough to sustain the constitutionality of the prohibitions on communication or retention in light of the vagueness of the phrase "related to the national defense?"

273. 64 Stat. 1005 (1950).

(3) What constitutes protected "information" under the subsections, and what culpability is required before its transfer is criminal?

(4) What makes a piece of paper containing defense information a "document" or other enumerated item for purposes of the subsections?

(5) What does "not entitled to receive it" mean for purposes of the communication and retention offenses?

The uninformative language employed by the draftsmen has never been discussed by Congress in terms precise enough to give adequate guidance for the resolution of these issues. Perhaps a concrete example will illustrate the difficulties. Justice White's discussion of the retention offense in his *Pentagon Papers* opinion assumes, without discussion, that copies of government papers are "documents," and not "information," for purposes of the section.[274] This conclusion, however, is not compelled. The originals were not purloined and the Government's proprietary interest in the documents was maintained; all that was lost was the secrecy of information contained in them. Even if an exact copy is a "document" as Justice White suggests, how close to the full original must the copy be? Does a letter from a friend in the executive branch that quotes a single paragraph from a government report constitute a document? What if the letter only paraphrases the original but reveals the information? By what principle can a line be drawn between document and information, especially when significant differences in the culpability requisite to violation of 793(d) and (e) may turn on the distinction?

Courts typically undertake to resolve issues at the margin of statutory coverage by looking to a statute's purposes. On their face, however, the purposes of subsections 793(d) and (e) are mysterious because the statutes are so sweeping as to be absurd. If courts turn to evidences of legislative intent, the mystery deepens because Congess never understood these laws. It did not realize that their literal terms might apply to speech leading to public debate, or preliminary activities undertaken with that aim. When concerns were voiced that these provisions might have some effect on the press, Congress did not respond by analysis or amendment of the bills before it, but rather said it was not so—through the clumsy and problematic anti-censorship provision—and approved the statute's broad language.

In this concluding discussion of 793(d) and (e), we shall attempt to tie the materials together and show how forbidding are the problems of implementing these subsections in the context of public speech about defense matters.

1. *Publication and Conduct Incidental Thereto.* In the 1917 legislative record, the question of controls on publication of sensitive information received at least as much attention as the problem of spying, and the most significant action was the rejection of a prohibition on publication not conditioned on

274. 403 U.S. 713, 739.

any specific intent requirement.[275] The 1950 legislative record was too confused to have had any particular focus, but the notion that somehow newspapers were not covered—except for "wrongful acts"—was never challenged. Subsections 793(d) and (e) therefore cannot be held applicable to publication of defense information that is motivated by the routine desires to initiate public debate or sell newspapers, unless this congressional purpose, confirmed by repeated subsequent refusals to enact broad prohibitions on disclosures, is ignored.[276] Failure to give effect to this legislative intention would be wrong with respect to a statute so inartfully drawn and legislative intention otherwise so opaque.

The critical question, in our view, is not whether publishing may properly be held a crime under subsections (d) and (e), for almost surely it should not. The problem instead concerns the manner in which the statutory language is to be read to exclude it. The choice is between distinguishing some concept of "publishing" immune from regulation, or by more general construction of the statute's culpability standards. Regardless of which approach is taken, is it only the act of publishing that is protected, or does the law also protect conduct incidental to publication? Is the newsman guilty of "retaining" items he plans to publish? Are his communications to others in the course of writing a story criminal? Is his source in Government an offender, and, if so, is the newsman a conspirator in that offense or an accomplice to it if he simply listens, or if he instigates the disclosure? These questions, of course, go to the heart of whether, as Justice White suggested in *New York Times*, newspapers may be criminally punished under subsection (e) for obtaining and printing national defense secrets.

In that litigation, the claim was strongly pressed by the *Times* that the statutory terms "communicate, deliver, or transmit" as used in sections 1(d) and 1(e) do not comprehend "publishing." Judge Gurfein so held in his district court opinion[277] and Justice Douglas later indicated his support for that position.[278] The argument is that the draftsmen perceived a difference between communication and publication and that they intended to make newspaper revelations criminal only when the statutes say "publish." Support for the proposition rests primarily on the structure of section 2 of the 1917 Act, currently subsections 794(a) and (b). It will be recalled that 794(a) bars

275. As earlier indicated, we reject as untenable the view tentatively suggested by Justice White in New York Times v. United States, 403 U.S. 713, 733-40 (1971), that Congress in 1917 intended to bar prior restraints but allow post-publication prosecutions for publication. Many in Congress thought that their constitutional power was restricted to making publication criminal after-the-fact. As the debates became more focussed, however, the legislative choice was seen to be whether or not to punish.

To be sure, section 1(d) covered tangible items and their contents only, whereas the rejected censorship provision pertained to information no matter what its source. But there is nothing indicating that the 1917 Congress saw this as a key distinction.

276. *See* text following note 354 *infra*.

277. United States v. New York Times, 328 F. Supp. 324, 328-29 (S.D.N.Y. 1971).

278. 403 U.S. 713, 721.

communication, transmittal or delivery of defense information to foreigners, while 794(b) prohibits both communication and publishing in time of war with intent to reach the enemy. Moreover, the rejected subsection 2(c) as initially drafted prohibited both communication and publishing and was subsequently narrowed, prior to the ultimate defeat, to prohibit only publishing. Two later enacted statutes in the espionage chapter, sections 797 and 798, also mention publishing.[279]

The argument that the draftsmen intentionally wrote "publishes" into the statutes when they wished to prohibit it does not, despite the statutory structure, convince us. We have not found a single clear statement in the lengthy legislative history of these bills that the word "communicates" does not embrace publishing. For example, that was not the ground on which Senator Kilgore's concern for newspapers was met in 1950;[280] nor was it the apparent understanding of those who framed the crytographic bill, section 798. If that understanding were clear, one would expect to find unequivocal evidence of it to appear in the massive debates on the 1917 Espionage Act. Such evidence is lacking. Speakers frequently used the words "communicate or publish" in sequence;[281] they also consistently used the words "publishes," "publications" and "publishing" when they were referring to newspapers. Neither usage, however, given that the statute said "publishes," demonstrates that the speaker regarded the terms "communicate, deliver, or transmit" as necessarily excluding publishing. Moreover, the few interchanges during the debates concerning the meaning of "communicates" came primarily from speakers who questioned the wisdom, whatever was done to newspapers, of making private communications criminal.[282] Most importantly, at no point

279. *See* text accompanying notes 370, 388 *infra*.

280. Had any of the respondents to Senator Kilgore's letter believed that publishing was not covered by sections 1(d) and (e) because not mentioned, they would surely have mentioned it.

281. *See, e.g.*, 55 CONG. REC. 781 (1917) (Remarks of Senator Cummins).

282. The principal comments in the Senate are at 55 CONG. REC. 873 (Remarks of Senator Overman) (The word publishing is broad enough to cover the word communicate. Communication of plans to a person, is a publication to that person); 55 CONG. REC. at 877 (1917) (Remarks of Senator Cummins):

> the word "publish" is not confined to the publication by a newspaper. I suppose that if I stand upon the street and make a statement I publish the statement in the sense of the law. If this were confined to the newspapers, it would still be objectionable, but not so objectionable as it is in its present form.

In the House, similar points were made. *See, e.g.*, the following interchange:

> MR. SHERLEY. Now I submit to the gentleman the inquiry as to whether it is necessary to embrace in your prohibition any sort of communication which would embrace a conversation that might not in any way have or be intended to have anything to do with publication, which is what you are really aiming at.
>
> MR. WEBB. It would be very little profit to prohibit the publication of a thing and then let a man verbally go upon the stump and proclaim it to the public by word of mouth.
>
> MR. SHERLEY. That would be more than a communication. The gentleman is assuming that "communicate" is the only word whereby you can define the offense. I suggest that it is broader than we need.

did anyone defend the idea that a newspaper might lawfully "publish" what an ordinary citizen was prohibited from "communicating."[283]

That no one confirmed an understanding of "communicate" that excluded publishing does not, however, explain why section 2 was drafted as it was. We can only speculate, but in our opinion, confusion and inadvertence, old friends of this legislation, are the likely causes. As initially drafted, sections 1 and 2(a) of S. 8148 were directly patterned upon the 1911 Act.[284] Subsection 2(a), like section 2 of the 1911 law, proposed severe sentences for those who breached section 1 of S. 8148 and then "communicated" the information to foreigners.[285] Nothing in the 1911 law suggests that Congress thought about the scope of the word "communicates," or if it comprehended publishing, and nothing indicates that the subsequent Congress thought about it in enacting subsection 2(a) in 1917. By contrast, subsections 2(b) and 2(c) were drafted on a fresh slate, and the drafters were concerned to prohibit disclosures of citizens and press regardless of whether they had had any contact with government places, documents, things, or personnel—necessary elements of a violation of section 1. Thus, use of the word "publish" makes clear the draftsmen's intent that it be covered in those newly drafted sections, but the failure to use the term in the carried-over subsections 1(d) and 2(a) does not prove the converse.[286]

Doubts that the legislative history justifies the conclusion that Congress saw a general distinction between communication and publication are reinforced because the distinction is not theoretically sound in the context of the espionage statutes and cannot be applied in any sensible fashion. If one has possession of information that is subject to statutory restrictions and tells it to a friend, such personal talk must clearly be characterized as a communication, or else the publishing exception would swallow the statute whole. At what point, however, does communication become publication: when one calls over six friends, or only when one hires a hall? Whatever the turning point, the anomaly is obvious: if the statute protects the right to read defense documents to a throng in Madison Square Garden, it cannot sensibly be construed

say 'published' I mean by word of mouth or by print"). *Id.* at 1712 (Remarks of Rep. Igoe) ("anything that affects the newspaper will affect the individual").

283. The newspapers were, of course, loudly condemning subsection 2(c). Some who supported the provision urged that their colleagues were cowering under newspaper pressure, a criticism that may have produced statements in response that citizens were to be protected more than the press.

284. The 1911 law is set out at note 25 *supra*.

285. *See* 54 CONG. REC. 2064 (1917).

286. Moreover, there was no need to add "publish" to 1(d) because the censorship regulations issued under section 2(c) would surely have covered, and subjected to greater sanctions, publication of defense secrets gleaned from wrongly divulged documents. Adding "publishes" to section 794(a), after it had been changed to prohibit communication to foreigners with intent or reason to believe that information is to be used to injure the United States or advantage a foreign nation, would have had little effect if our "primary" use distinction, text *supra* at note 178, is accepted.

to prohibit reading them to a friend at home. The person who publishes widely may of course be more likely to influence public decision-making, but the person who communicates to a friend may well be working out his own policy positions or trying to convince his friend. The greater enhancement of public debate achieved by widespread publication is inversely proportional to the extent to which secrecy is compromised. In the intersections of the values of public debate and secrecy, the private conversation and the public lecture are balanced at the same point. With respect to publication, the values on each side of the equation are augmented, but the same tension is maintained. If general publication is protected, it is ludicrous not to protect private conversation with similar intent. Thus, a line between publishing and communicating cannot be even generally located by reference to the purpose of the statutes.

One answer to this difficulty might be that publication, to be immunized from the subsections by virtue of congressional intent, requires involvement of the media. It might be argued that communications by someone other than a newsman, no matter how obviously geared to public debate on defense matters, is not publishing for purposes of differentiating publications from the statutory coverage of communications. Leaving aside first amendment and equal protection objections, as well as congressional concern for ordinary citizens, this interpretation would necessitate guidelines as to who is a publisher and who are newsmen. The statute contains no such standards and posing them by judicial construction is, in our opinion, virtually impossible.[287]

Finally, any effort to distinguish publication by the media from communication would be vastly complicated by the fact that such publishing inevitably involves many preliminary communications and retentions. It, too, is not an event but a process.[288] Assuming that publication is protected, if a person has possession of copies of classified documents, does he publish them if he hands them to a reporter who will have them published, or is that a prohibited communication, transmittal or delivery? When the reporter hands them to a typesetter, is that a publication or a prohibited communication? If publishing is not covered by the statute, can preliminary and incidental communications and retentions—conduct by persons necessary to accomplish the sort of publication Congress wished to protect—be held a violation of the statutes?

It was with reference to this problem that Justice White's dicta in *New York Times v. United States* went astray, in our opinion. Without intimating his views on the correctness of Judge Gurfein's view that publication was not comprehended within "communication," White noted that neither publication nor communication was required to violate the statute; mere retention would suffice.[289] That approach, in our opinion, can rest on no sound interpretation

287. *Cf.* Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

288. *Cf.* Roe v. Wade, 93 S. Ct. 705, 731 (1973); FREUND *et al.*, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 1 (1972).

289. 403 U.S. 713, 738 n.9.

of the statutes. To protect publishing but criminalize the transfer of the story to the typesetter is silly. Likewise, it would be wrong to link the reporter to an offense of initial disclosure by a government employee—if such an offense existed—by saying the reporter caused it, or by characterizing him as an accessory to the employee's disclosure. If it is conceded that Congress meant to exclude publication from criminal prohibitions pertaining to communications, it is inconceivable that they would contemplate making criminal retentions incident to that act, unless interests other than disclosure of secrets are at stake.[290]

Of course, it would not be inconceivable to treat as a crime initial disclosure of a defense secret by a government employee to a reporter, even if publication and incidental communications and retentions by non-employees within the publication process were protected.[291] We might well adopt a system which protects all acts in the publication process but makes criminal the initial revelation by the government employee. Such a system would be a rational, if a bit uneasy, compromise of the competing values of secrecy and executive branch loyalty, on one side, and freedom of speech on the other. The espionage statutes do not, however, enact such a system. The language of 793(d) governing the legality of communications and transfer by lawful possessors is exactly the same as that of 793(e) governing communications by unauthorized persons. If communications by non-government employees leading up to publication are outside the scope of 793(e), there is no statutory basis for different treatment of the government employee's disclosure of secrets to the press under 793(d).

On balance, we do not think it is feasible to give effect to the legislative intention by simply excluding "publishing" from the scope of "communication." Despite some evidence resting on the drafting of 794(a) and (b), the legislative history of the espionage statutes does not suggest that interpersonal discussions about defense policy were valued differently than newspaper pub-

290. It might be an appropriate policy to protect the form of expression in government documents even if the revelation of their contents is privileged. Two considerations might support such a position which would justify treating taking or retention of documents more strictly than revelation of secret information. First, there are differences, particularly in diplomatic matters where national prestige is at stake, between widespread knowledge and official proof, as is indicated by the intense embarrassment occasioned by official acknowledgement of wiretaps on foreign embassies. *Cf.* Giordano v. United States, 394 U.S. 310 (1969).

Second, there may be a considerable "chilling effect" on government employees if they know that their prose—written under time pressure for superiors who are generally aware of the complexities of the situation, and need not be reminded of qualifications discussed orally—is likely to be printed in the newspapers as representing the entirety of their advice.

On the other hand, nothing persuades like the actual document. For example, the Pentagon Papers reveal little that was not already publicly known; they had impact because they confirmed widely held beliefs with official prose. Prohibiting revelation of the actual documents in circumstances where revelation of the information contained therein would not warrant penalties may serve primarily to protect inappropriate Government deception. Thus, here again the same tension is maintained.

291. *See* text accompanying note 447 *infra*.

lications. Congress was quite concerned to protect the individual citizen curious about defense-related matters who wanted to discuss such matters with family or friends; publication and communication motivated by concern about official policy should consequently be treated as equally legitimate.

If publication and communication or retention cannot be satisfactorily distinguished as modes of conduct in the context of these provisions, how can subsections 793(d) and (e) be read to give effect to Congress' intention not to make participation in debate about defense matters criminal? A reading of the statutes must be found which can operate generally; in other words, publication must be excluded from coverage on an analysis of the statutes that applies equally to acts of communication and retention. We must turn, therefore, to other elements of 793(d) and (e) in the effort to discover such a reading.

2. *Culpability.* (a) *Willfully.* If our conclusions concerning "publishing" are accepted—that Congress had no special understanding of "communicate, deliver or transmit" that automatically excluded it—then application of sections 793(d) and (e) to public revelation of defense secrets, and conduct preliminary thereto, hinges primarily on the meaning of the term "willfully." Can some sense of the term be found which accords reasonable respect to both the language and structure of the statutes, the legislative history of the particular term, and the evidence that Congress did not contemplate making criminal revelations in the course of public debate except in the most limited circumstances? We think so, although it is admittedly a struggle, and requires adopting a meaning of willfully that almost surely no single Congressman or Senator would have recognized as stating his own understanding.

"Willful" is one of the law's chameleons, taking on different meanings in different contexts.[292] It may be construed to require merely awareness of the physical facts of one's behavior;[293] under other circumstances, it may mean awareness that conduct is illegal,[294] or, more generally, that it be undertaken with bad motive.[295] In statutes where criminality turns upon the causing of a particular type of harm, willfully may require specific intent to cause that harm.[296] The different nuances that courts have read into the term are largely attributable to judicial desire to restrict particular criminal statutes. Narrow

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292. *See generally* Weinreb, *Extended Note B, "Willfullness,"* in I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 148 (1970). *See also* Weinreb, *Comment on Basis of Criminal Liability; Culpability; Causation: id.* at 105, 128: "There may be no word in the Federal criminal lexicon which has caused as much confusion as the word 'willfully' (or 'willful')." The Model Penal Code limits use of the term to describing how it should be construed if employed by other draftsmen. MODEL PENAL CODE § 2.02(8) (Proposed Official Draft 1962).

293. *See, e.g.*, Ellis v. United States, 206 U.S. 246 (1907).

294. *See, e.g.*, United States v. Murdock, 290 U.S. 389 (1933).

295. *See, e.g.*, Felton v. United States, 96 U.S. 699 (1877).

296. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); Hartzel v. United States, 322 U.S. 680 (1944), *construing* section 3 of the Espionage Act of 1917, *as amended*, 18 U.S.C. § 2388 (1970).

interpretations of "willfully" are especially common where legislation is at the boundaries of constitutional power—as where statutes bear upon free expression.[297] Insofar as sections 793(d) and (e) bear upon speech, the natural tendency of courts should be to accept a narrow construction of "willfully," in order to avoid first amendment problems of vagueness and overbreadth. The problem in so doing cannot be discounted, however. Neither the language nor the legislative intent of the espionage statute indicates that "willfully" should be given any particular narrow meaning. Moreover, the reported cases under 793(d) and (e) all treat "willful" as a term of broad signification, quite different from the culpability standards of 793(a) and (b).

The structure of the statutes makes apparent that whatever "willfully" means in subsections 793(d) and (e), it does not restate the culpability standards of 793(a) and (b) which require "intent or reason to believe." The distinction in statutory language surely points to a different, and broader, meaning for "willfully." The legislative history of the 1917 Act is replete with concern that these criminal statutes make use of appropriate standards of culpability to distinguish the morally innocent from the guilty. Insistence on the importance of culpability led to reformation of three provisions and played an important part in defeating a fourth. In the face of that careful inclusion of specific intent standards, the claim that Congress in 1917 intended willfully in 793(d) and (e) to be synonymous with the culpability provisions of 793(a) and (b) is untenable. Furthermore, the legislative history makes clear that the Congress understood a difference. On several occasions during the floor debates, the Senators and Representatives discussing the bills defined "willfully" in a broad fashion.[298] Congress' problem was that it did not understand the breadth of conduct reached by a literal reading of section 1(d), not that it regarded "willfully" as equivalent to "intent or reason to believe."

The 1950 revision did introduce some confusion on this point into the legislative history. The Executive draftsmen of 793(d) and (e) clearly intended "willful" to require a minimum of culpable intent. Their concern was to close loopholes in the law, not to impose stricter standards on the Government by requiring proof of illicit ulterior purpose. Consistent with this, the House Report,[299] which is in large measure taken from the Justice Depart-

297. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

298. *See* 54 CONG. REC. 3604-05 (1917) (remarks of Senator Cummins) (proposed amendment of the censorship provision, § 2(c), to require "willful" violation. Effect conceived to be preservation of ignorance of law defense); 55 CONG. REC. 1717-18 (1917) (remarks of Representative Graham) (Sections 1 and 2 of H.R. REP. No. 291 protect the innocent because Government must prove "a guilty purpose, to wit, to injure the United States . . . Section 3 [House version of 793(d) and (e)] has not the intent in it"); *id.* at 1763 (Remarks of Representative Mann) ("A man who delivers a thing does it willfully. That is what this [§ 31] says"); *id.* at 2064 (remarks of Senator Sterling) ("The element of intent or knowledge that the information [is] to be used to the injury of the United States or advantage of any foreign nation is omitted from these two subdivisions.").

299. H.R. REP. No. 647, 81st Cong., 1st Sess. (1949).

ment's letter accompanying the proposed legislation,[300] referred to the absence of an intent requirement in section 793(d), expressly contrasting it with the stricter culpability requirements imposed by sections 793(a) (b) and (c). To be sure, the Committee's justification for such general culpability in 793(d)—that the persons covered are those who are in close relation to the Government—argues for a higher standard of culpability in section 793(e) where coverage is general.[301] "Willful," however, cannot mean one thing as to government employees and something stricter for non-employees, particularly as sections 793(d) and (e) do not in terms refer to government employment.[302] The House Committee's statements favor the broad meaning.

In the Senate, however, the matter is in doubt. The Senate's willingness to enact the proposals without a whimper of protest probably resulted from assurances that they were of narrow scope. The legislation's sponsor, Senator McCarran, indicated that he would not support legislation that made newspapers liable without a "wrongful" act. The response McCarran's inquiries elicited from Attorney General Clark is fairly read as implying a narrow scope to the bill, and most directly on point, the Legislative Reference Service memorandum stated that sections (d) and (e) were, insofar as culpability is concerned, like sections (a) and (b). Do these strands afford a basis, despite the statutory language and the countervailing evidence of legislative intent, for construing "willfullness" to require conduct animated by anti-United States or pro-foreign interests?

On balance, we think not. From our reading of the legislative history, Congress in 1950 failed to appreciate the extent of the problem just as it had in 1917. The House clearly thought that "willfully" implied no special culpability requirements. There is, furthermore, no evidence that the Senate acted upon the Legislative Reference Service's misapprehension of the clear difference in culpability requirements that are evidenced by the structure of the Act and the statements of the drafters. Neither chamber, however, realized the impact the statute might have upon activities that it would not consciously have chosen to make criminal. In part, that failure resulted from soothing statements by the

300. 95 CONG. REC. 441-42 (1949).

301. *See* text at note 247 *supra*.

302. The extent to which courts may revise inartfully drawn legislation to effectuate policies which might have been chosen but were not chosen clearly is a difficult issue. *See, e.g.* Scales v. United States, 367 U.S. 203, 211 (1961) (strain but not pervert). *Compare* Dennis v. United States, 341 U.S. 494, 499-500 (1951) ("intent to overthrow . . . the government of the United States by force and violence as speedily as circumstances would permit" interpolated into statute to save it) *with* United States v. Reese, 92 U.S. 214, 221 (1875). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

The problem with section 793(d) is that it is not limited to government employment but rather speaks to "lawful" possession, a term which catches much more than current government employees. *Cf.* Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964) (prohibition on applying for or using passports may not be limited to high ranking members of registered Communist organization to save a broadly drawn statute).

sponsors that newspapers would have nothing to fear, and from the anti-censorship provision that alleviated concerns about prohibitions aimed at publication—matters to which we will return in a moment. More important, in our view, was the preoccupation with other more clearly drawn and controversial provisions of the 1950 Act. To cure these errors by interpolating the culpability requirements of 793(a) and (b) into "willfully," when the legislative history makes clear that Congress never entertained such a notion, seems inappropriate.[303]

A narrow understanding of "willfully" in subsections 793(d) and (e) has no support in the case law, which recognizes a difference between willfully as there used, and intent as used in 793(b) and 794(a). Most importantly, in *United States v. Coplon*,[304] the court construed section 793(d) to require "no such intent;"[305] it merely required that defendant Coplon obtained possession of the documents and attempted to transmit them to the co-defendant, who was not entitled to receive them."[306] Similarly, in a civil case, *Dubin v. United*

303. To be sure, in Dennis v. United States, 341 U.S. 494 (1951) the Court construed the advocacy provisions of the Smith Act, 18 U.S.C. § 2385 (1970) to require specific intent to overthrow the Government, even though other provisions expressly required such intent. But we do not think this precedent is compelling in the context of § 793(d) and (e). First, in *Dennis*, there was no direct evidence of contrary congressional intent. Second, as Judge Learned Hand noted in the Court of Appeals, the "specific intent" may be thought to inhere in the concepts of "teaching" and "advocating" use of force. 183 F.2d 201, 214-215 (2d Cir. 1950).

304. 88 F. Supp. 910 (S.D.N.Y. 1949). The issue was presented in the context of claimed double jeopardy. Defendant Coplon had been convicted in the District of Columbia for violating 18 U.S.C. § 793(b). In the Southern District of New York she was indicted for conspiracy, attempt to communicate in violation of 18 U.S.C. § 793(d) (section 1(d) of the 1917 Espionage Act), and attempt to communicate in violation of 18 U.S.C. § 794(a). Applying the additional material fact test of Blockburger v. United States, 284 U.S. 299 (1932), the court held the offenses to be distinct. Although the court said that lesser intent distinguished 793(d) from 793(b), it did not state why proof of violation of 793(b) did not necessarily establish attempt to communicate in violation of 793(d) as well, insofar as "intent or reason to believe injury or advantage" requires that the actor contemplate unauthorized revelation.

Interestingly, the jury convicted Coplon of conspiracy, and attempt to communicate in violation of 18 U.S.C. § 794(a). She was acquitted of the charges under 18 U.S.C. § 793(d), indicating that the jury misapprehended the law, as well they might, given the sloppiness with which it is drafted. The Court of Appeals rejected the claim of error based on inconsistent verdicts, invoking the law's *deus ex machina* for such matters—presumed jury leniency or compromise. *See* United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) *citing* Dunn v. United States, 284 U.S. 390, 393 (1932).

Perhaps the most ominous aspect of *Coplon* is its assumption that a recipient of wrongly disclosed defense information can be prosecuted as a conspirator with the person who discloses. Note that even if the current 18 U.S.C. § 793(d) and (e) are construed to apply only to government employees, application of conspiracy doctrines to recipient newsmen would make criminal receipt of defense information where the reporter cannot claim a good faith belief that the employee was privileged to disclose the particular matter. That result might properly be barred by regarding 18 U.S.C. § 793(e), construed to require "intent or reason to believe," as preemptive of conspiratorial or accessorial liability, at least absent aggravating factors. *See* text accompanying note 354 *infra*. *Compare* the Administration's recent espionage proposal S. 1400, 93d Cong., 1st Sess., § 1124 (1973), which precludes prosecuting unauthorized recipients of classified information disclosed by government employees or former employees as accomplices or conspirators. The proposals are discussed at text following note 425 *infra*.

305. "[S]pecific intent that the information be used to the injury of the United States and to the advantage of a foreign nation." 88 F. Supp. at 911.

306. *Id.*

States,[307] the court assumed that private retention of radar devices that "related to the national defense," erroneously sold by the Government as surplus property, would violate section 793(e) even though the retention was clearly not animated by anti-United States motives.

This legislative action, and the judicial rulings on the scope of sections 793(d) and (e), provide no support for a narrow conception of "willfully" that looks to motivation. It should be noted, however, that even if the phrase is construed to disregard the actor's ulterior purpose in communicating or disclosing, substantial narrowing of coverage may be achieved depending upon how issues of mistake of fact and law are resolved. These issues are not dealt with in any articulate way in the legislative history, but the manner of their resolution has considerable bearing upon constitutional issues of vagueness.

First, does the law make criminal transfer of a defense-related document where the transferor has no basis whatever for knowing that it is "related to the national defense?" If one happens upon a paper bearing chemical hieroglyphics and transfers it to a chemist friend, is an offense committed if the document "relates to the national defense?" Suppose it explains, if one knows the meaning of the symbols, how a top-secret explosive compound is synthesized. Surely it was not the intent, either in 1917 or in 1950, to make criminal the transfer of a defense-related document by a person not knowing or having reason to know of its significance. Subsections 793(d) and (e) are not offenses of absolute liability. That point was the focus of the Legislative Reference Service's response to Senator Kilgore's question concerning "wrongful" acts.[308] Such a transfer should not be termed "willful."

Second, suppose a chemist has the document and understands the formulae, but believes that the document nonetheless does not "relate to the national defense" because the existence of a comparable series of compounds is well-known, and, to his knowledge there is no military reason to prefer the documented compound over others. Is transfer of the document by him an offense, other elements of the crime being assumed, if the Government establishes that it does indeed relate to the national defense because this particular compound is stable at the extreme temperatures caused by some military usages, whereas all other comparable compounds break down? Suppose the paper had a stamp on it saying "this document relates to the national defense," but the chemist believes strongly that it has no such relationship because, despite the Government's best efforts to maintain secrecy, the formula has been printed publicly, albeit in an obscure journal? At what point is the mistake of "fact" better characterized as a misapprehension of the legal

307. 289 F.2d 651 (1961). *See also* United States v. Sawyer, 213 F. Supp. 38 (1963).

308. The Service understood Senator Kilgore to be asking whether the offenses created absolute liability and responded that they did not.

standard governing defense-relatedness, and what ought to be the consequence of such misapprehension?

Although Senator Cummins believed that conduct was not "willful" when done under mistake of law,[309] such issues received no real consideration in either the 1917 or the 1950 legislative history. However, the insistence that subsections 793(d) and (e) cover only wrongful acts suggests that criminality should turn on whether the actor's misapprehension of defense-relatedness for whatever reason is culpable. Certainly, the term willful may be read to accomplish this result.[310]

If willfully is read in this fashion, it may substantially affect the constitutional issues of vagueness. Although space limitations preclude lengthy treatment of complex Constitutional law problems herein, they must be briefly considered. In *Gorin* the Supreme Court set out a broad understanding of "related to the national defense," holding the term precise enough to meet due process vagueness objections because violation of 793(b) and 794(a) required demonstration that the defendant had acted with the culpable purpose of injuring the United States or advantaging a foreign nation.[311] A person who acted with such purpose could be left to speculate at his peril concerning the outer parameters of information related to the national defense. The vagueness issue raised by sections 793(d) and (e) is whether the term "national defense" is sufficiently definite when the law threatens those whose revelations are animated by desire to inform the public.

The question is an exceptionally difficult one because so much turns on how other issues of coverage are treated. For example, if transfer of "national defense information" were held not "willful" unless the actor was cognizant that the materials he communicated did "relate to the national defense,"[312] there could be no issue of vagueness. The Constitutional problem is simply whether Congress may enact proscriptions that broad. On the other hand, any statute that made simple communication of national defense information an offense without regard to the actor's appreciation of its defense-related status would in our view be unconstitutionally vague.[313] Even granting that current

309. *See* 54 CONG. REC. 3604-05 (1917).

310. *See, e.g.* United States v. Murdock, 290 U.S. 389, 396 (1933) (conduct not willful when bona fide misunderstanding of law).

311. *See* text accompanying note 122 *supra*.

312. Reading willfully to require intent to transfer defense related material, *cf.* Screws v. United States, 325 U.S. 91 (1945).

313. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971) for a recent statement of vagueness standards. It seems to us that vagueness is inevitable insofar as the same standard "related to the national defense," purports to govern espionage and public disclosure. Courts in the espionage context have properly construed that standard broadly and imprecisely, counting on culpability to make it fair. It is better to remit the issue of the criminality of the disclosure to Congress, *cf.* Kent v. Dulles, 357 U.S. 116 (1958), than attempt precision in formulating defense-relatedness that will undercut prosecutions for espionage proper.

law requires that information be "secret," in the sense that the matter must be one the Government has sought to keep secret,[314] and intimates that it must be information susceptible to injurious or advantageous use,[315] there are still no constitutionally definite standards for what information is covered. That is particularly the case insofar as the law is so imprecise on when and whether widespread unauthorized disclosures preclude defense-related status despite Government assertions that information is still restricted.

These vagueness objections are lessened if, as we shall shortly argue, subsections 793(d) and (e) are not statutes which penalize unauthorized transfer of any defense information regardless of its source, but are instead intended to control dissemination of documents and information originating in the Government. Consider, for example, the government employee officially entrusted with documents that his employer indicates are defense-related. Is it unconstitutional to force him to speculate whether his superior's assessment is right.[316] We think not, giving weight to the employee's general obligation to heed his superior's instruction. If a newspaper acquires the same document, is it proper to hold official notice against them, and does it matter by what means they gain possession of the document? Suppose the newspaper does not receive documents but learns information from government employees, or friends of employees. At some point, the fact that information traces back to a distant government source ought to have no bearing on the question whether the standards governing further dissemination are drafted with appropriate precision.

Of course, vagueness is not the only issue. Even if prohibitions on communications are perfectly precise, there are questions of whether they unconstitutionally abridge freedom of speech or press by sweeping too broadly.[317] In our opinion, subsections 793(d) and (e) are overbroad if construed to apply to documents and information without regard to source unless "willfully" is also construed to permit evaluation of the actors' motives in disclosing. Suppose an actor knows that information relates to the national defense but believes that its military significance is far outweighed by its importance for public debate. In that belief, he communicates it widely. A construction of willfullness that required awareness that the contemplated conduct was defined as illegal would not provide a defense, for there would have been no mistake of any kind and the statute says nothing about public debate as a justification. Nor can "relating to the national defense" be given a limited reading to exclude matters of public importance. Such material should and

314. *See* text accompanying note 141 *supra*.
315. *See* text accompanying note 124 *supra*.
316. An interesting problem is whether classification, purportedly done in the interests of national defense, serves as adequate notice insofar as overclassification is so admittedly widespread.
317. *See* United States v. Robel, 389 U.S. 258 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415 (1963).

would be covered if sent abroad by a spy, and one can hardly construe "national defense" differently in two sections of this Act. In our opinion, the publication of much information of advantage to a foreign nation would be constitutionally protected.[318] If this simple proposition is granted, the statutes are overbroad because they do not provide a statutory basis for weighing the advantage to a foreign nation against the benefits of revelation to the United States.

The overbreadth problem is more complex, however, if courts construe subsections 793(d) and (e) to apply only to revelations of documents and information originating directly in the Government. We believe that current and former employees may constitutionally be subjected to penalties for revealing defense information entrusted to them, in circumstances where citizen communication of the same information discovered independently could not be prohibited. But does the citizen stand on the same first amendment footing as the employee if his information is attained as a direct consequence of the employee's breach of duty? Does it matter whether the "information" is orally received or is in documentary form? It may well be that the first amendment provides greater protection to reporting of information derived from observation not in itself unlawful than it does to publication of secret information directly derived from an employee's unlawful disclosure.[319] The statute is not, however, drafted to take account of these differences.

We set forth these Constitutional dilemmas not with the thought that they can be adequately treated herein, but rather to emphasize that their presence argues for constructions of "willfully" that make their resolution unnecessary. But avoidance of constitutional issues is not the only reason for construing "willfully" to take account of the purposes which animate revelation or retention.

Whatever the evidence that "willfully" was meant broadly, the fact remains that the Congress did not understand the consequences of what was done. In the 1917 legislative history there is nowhere to be found, once the debate on subsection 2(c) in S. 2 was joined, express statements that citizen revelation of secret government documents in the course of public or private debate was an offense. With respect to the 1950 legislation, not only the legislative sponsors but also the Attorney General assured Congress that the provisions were of narrow scope. In light of the recurrent conflict between the Executive and Congress over the extent to which defense policy should be kept secret, those assurances should be heavily weighted. Furthermore, there is substantial

318. Again, this follows unless information protected against culpable espionage is restricted by tighter formulation of what constitutes an "advantage." We think it wrong to do so.

319. *See generally* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers* 120 U. PA. L. REV. 271 (1971) pointing out the Supreme Court's failure to face these issues in New York Times Co. v. United States, 403 U.S. 713 (1971). *But cf.* Liberty Lobby v. Pearson 390 F.2d 489 (D.C. Cir. 1968).

evidence that neither Congress, nor for that matter the Executive, has construed subsections 793(d) and (e) to bear upon conduct done to participate in public debate. We shall set forth the Congressional understanding in the course of discussing other legislative treatments of the issue of secrecy, and Executive understanding in the course of discussing the classification system.

What then should "willfully" mean, if the statute is to be saved by narrowing construction, rather than struck as vague or overbroad so that the problem can be returned to Congress for clarification. Impressed by the absence of evidence that the statutes were meant to bear upon matters of first amendment concern, we think the term should be read *in pari materia* with the proviso to the 1950 Internal Security Act. The proviso, although applicable to the Act in general, had its roots in newspaper concern for the reach of the proposed amendments to subsection 1(d) of the 1917 Espionage Act. Its statement that nothing in the Act shall be construed "to limit or infringe upon freedom of the press or speech" supports an understanding that conduct is not willful for purposes of the section, when undertaken for any of the variety of reasons—stimulating public debate, satisfaction of individual curiosity, or conducting private policy discussions—that reflect interests protected by the first amendment. As a practical matter, such a construction leaves "willfully" meaning almost what it does in sections 793(a) and (b)—requiring purpose or knowledge that the primary use to which information will be put is the injury of the United States or the advantage of a foreign nation. It would also allow, however, for prosecution of employees who wrongly sell defense information to commercial organizations for private gain.

(b) *Transfer or Retention of Information.* The 1950 amendments added statutory prohibitions on the transfer or retention of "information" to the list of tangible items previously covered by 793(d) and (e), purportedly to establish different culpability standards for transfer or retention depending on whether "information" or a "document" was at stake. Transfer or retention of "information" is criminal only if the actor has "reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation." Does this phrase describe the "quality" of "information" that is transferred or retained, or does it instead speak to the consequences the actor expects to flow from his conduct?

The language of the statute implies that "reason to believe" must exist only with respect to the information's susceptibility to wrongful use. So construed, it is doubtful that the phrase adds anything. Information or documents should be held to "relate to the national defense" only if susceptible to advantageous or injurious use in the hands of an implacable foe. "Related to national defense" cannot be read to include the completely insignificant, as we have previously argued in our analysis of that term.[320] If we are correct, adding

320. *See* text accompanying note 125 *supra*.

"reason to believe" to modify information does not limit the amount of information that would otherwise be covered by sections 793(d) and (e).[321]

A second meaning, if the phrase describes only the "quality" of information, is that it provides a defense of mistake of fact. Whether that adds anything depends upon how broadly "willfully" is read. We have argued that "willfully" requires even as to documents, at least culpable negligence with respect to defense-relatedness.[322] Only adamant insistence by Congress should require courts to adjudicate the constitutionality of strict liability in this area, and no such direct instructions have been given.[323] If this position is rejected, however, the "reason to believe" phrase adds a defense of non-culpable mistake for information that is lacking for documents.

These are the possibilities if what must be "reasonably believed" pertains only to the quality of information. What effect does the culpability standard have if it is read to require the actor's awareness of consequence that might flow from his communication or retention? For purposes of our concern—newspaper publication and conduct incident thereto—it would seem to have no effect whatever. A reporter or publisher inevitably would have reason to believe that national defense information "could" be used to injure or advantage. The primary-secondary use distinction we suggested as a limit on the culpability formulations of sections 793(a) and (b), which employ the phrase "is to be used," is linguistically untenable in this context.

3. *Documents and Information.* Subsections 793(d) and (e) prohibit communication, transmittal or delivery of a series of tangible items such as documents, blueprints, photographs and notes that relate to the national defense. They also prohibit transfer of "information" relating to the national defense, subject to an additional culpability requirement of dubious significance. Consequently, numerous issues of characterization must be considered. What makes a piece of paper a "document" within the meaning of the section? What is the line between "documents" and "information"? What does "information" encompass? Is it only information derived from tangible government papers, or does it include knowledge acquired through personal observation?

For example, assume that the Government has deemed secret all documents pertaining to a complex dialing procedure that must be followed in order to telephone a military installation directly. If a civilian accidently discovers the procedure while dialing his telephone and writes down the information, does he possess a "document" or a "note" to which either subsection applies? It is remarkable that the statutes are silent on so basic a point. Our reading

321. If we are wrong, then "reason to believe" precludes penalizing disclosure of trivial information, but not trivial documents.

322. *See* text accompanying note 310 *supra*.

323. The Senate Report quoted *supra* note 245, may be read as indicating a belief by its authors that no such defense is present as to documents.

of the legislative record, from 1950 back to 1911, shows that the people who discussed these subsections almost without exception regarded them as covering only disclosure of defense-related information that originated within the Government.[324] Thus, although section 794(a) would punish the transfer of independently discovered defense information to foreigners if done with a culpable motive, sections 793(d) and (e) do not apply.

While this reading of the statute narrows its coverage considerably, it still leaves a baffling series of questions about when a writing containing information originating in Government is a "document" or a "note." Which of the following are covered by the statute, assuming in each case that the information written on the paper "relates to the national defense": a) a piece of paper owned by the Government; b) a word-for-word copy on personal stationery of a document owned by the Government; c) a paraphrase on personal stationery of a government-owned document; d) a writing prepared by a non-employee after conversations with a government employee whom he realizes has had access to government-owned documents (following an interview with a military officer, a reporter writes: "After full review of the evidence, the Air Force has secretly determined that the new plane does not meet its velocity specifications"); e) the private writings of a government employee incorporating information he has been told ("Dear Mother: Next month we invade Normandy"); f) the private writings of an ex-government employee ("When I was in the Intelligence Service, we had a highly successful system for eavesdropping on the East German Ambassador"); or g) a writing prepared by a non-employee on the basis of personal observation at military installations ("Twenty-two B-52's are now stationed at the air-base")?

These questions cannot be answered by reference to the legislative record because so far as we can ascertain no one expressed opinions on them. We must therefore deal with them without guidance. On the one hand, the test of what constitutes a "document" or a "note" could be simply a matter of whether information happens to be written down, thus treating all the items listed above as "documents" subject to the prohibition on merely "willful" retention or transfer. This produces odd results, however, particularly if, contrary to our belief, the "reason to believe" culpability phrase has significance. In such cases, an oral revelation by a government employee might be innocent while the retention of notes of what he said would be criminal. Moreover, under this reading one's own transcribed recollection could be characterized as a government document—a most doubtful construction.

On the other hand, to limit "documents" and "notes" to physical items in which the Government has a proprietary interest makes only slightly better

324. Section 3 of H.R. 291 was expressly limited to matters "belonging to" the Government. *See* text at note 226 *supra*. For the Senate discussion, *see* text following note 207 *supra*.

sense. In terms of protecting secrecy interests, whether what is taken is the original document or a verbatim copy is of essentially no significance; in fact, the loss of an original may be preferable, at least where the Government has other copies, because it enhances the likelihood of discovery that secrecy has been compromised. Nevertheless, three considerations might be advanced in favor of such a limited construction. First, if the "reason to believe" phrase modifying information does require additional culpability, a construction which augments the "information" category at the expense of "documents" is preferable for first amendment reasons. Second, the legislative record reveals the Justice Department's general belief that Julian Wadleigh's transfer of the abstracts of documents to a communist cell-group was not criminal under subsection 1(d) of the 1917 law,[325] a judgment suggesting perhaps that abstracts are not "documents," and should be deemed "information" covered by the 1950 amendment. Third, subsection 793(b) makes express reference to "copies," while 793(d) and (e) are silent. On balance, however, we think a mid-point should be found if these laws are found constitutional and effective; the "document" concept should include only verbatim copies.

The problem of finding dividing lines between "documents" and "information" is, of course, especially acute if the "reason to believe" phrase modifying information requires additional scienter. The revelation offenses are defined in terms of an actor who "communicates, transmits or delivers." Consider a United States government employee in possession of a classified defense document. Does he communicate, transmit, or deliver a document or only information, if he a) lets someone read it; b) tells another the substance of the information which it contains; c) reads it over a phone; d) gives another person a writing which reveals information in it; e) gives another person a copy of it? Similarly, does the person who listens acquire possession of a "document," the subsequent transfer or retention of which is criminal under the same standards? What if he takes notes? If he takes it down word for word?

Drawing a line between "document" and "information" may also be significant for purposes of the retention offense. The law proscribes "retention" of both, but surely this command is meaningless as to information not in tangible form. If one has been told that a new airplane does not work, one cannot possibly purge oneself of that information. One could, however, turn over all notes on the subject, substantial problems of self-incrimination aside. The legislative history is mute on the point, but it seems far-fetched to conclude that Congress intended to prohibit one's writing down things he has observed or has been told; custody of government papers seems the more likely concern. Thus, the retention provision may well be overbroad and beyond reformation insofar as it applies to information.

The breadth of the "information" category raises a series of issues similar

325. *See* [illegible]

to those associated with "documents." While the legislative history makes clear, we think, that information originating in the Government is the intended meaning, troublesome questions nonetheless arise. Must the information come from some document as to which the Government has a proprietary interest, or can an official's knowledge be the source? The arguments in support of a limitation to documentary sources rest on evidence earlier noted. The draftsmen were quite clearly concerned with whether an oral revelation of a protected document was an offense under subsection 1(d). Although in 1917 Congressmen talked as though it were,[326] the deletion of "information" from 1(d) made the issue less than certain. Nothing we have found indicates an intention on the part of the 1950 draftsmen to do more than plug this loophole in the protection of secret documents or an understanding that any and all defense "information" originating within the Government is covered regardless of its source in listed tangible items. Moreover, as we will discuss presently, such an expansive treatment of information, while sensible from the security perspective, would increase the strain on the concept of "entitlement." Insofar as "information" is not classified unless it is in documentary form, by what process may it be shown that a recipient was "not entitled to receive it?" Again, there is nothing substantial enough in the legislative record to make any particular answer defensible.

not so
See E.O. 11652
& E.O. 12065

4. *Entitled to Receive It.* Construction of the entitlement language of 793(d) and (e) follows the frustrating pattern of these statutes. The common sense meaning of the term seems to have been rejected by Congress in 1917, and furthermore would give the statutes a sweep that was certainly not acceptable to the 1917 or 1950 Congresses. Each of the four offenses defined by these two statutes hinges upon the characterization of recipients as either entitled, or not entitled, to receive information. The two retention offenses assume the former situation; the communication offenses, the latter. Yet in a prosecution under these acts, how can either term be given effect? "Entitled to receive" is not defined in the espionage statutes or in any other provision of the United States Code. If a person is entitled to information only when authorized by statute, then very few people—including Government officials with security clearance—are entitled to anything.[327] Conversely, if one is entitled to receive information in the absence of a statute barring its acquisition, the ordinary citizen again stands on a par with a general. Accordingly, if the entitlement concept of subsections 793(d) and (e) requires statutory implementation, the communication and retention offenses are unenforceable.

Congress, however, did not intend that the entitlement concept could

326. *See* notes 214-15 *supra*.

327. Statutes which authorize specific officials to have particular information are very rare. *See, e.g.*, 42 U.S.C. §§ 2161-2163, 2277 which empower the Atomic Energy Commission to decide who may lawfully have access to "restricted data," as defined in 42 U.S.C. 2014(y).

be given effect only by statute. When the "not entitled to receive it" phrase came into the law in the 1911 Act, Congress was concerned in the first three clauses with the protection of military installations and other physical places. Although no legislative history illuminates the point, Congress probably thought that the official in charge of a protected place would be the source of rules defining who was "not entitled to receive" information concerning or stored within the place. Clauses four and five of the 1911 Act, which covered government employees and others who had control over defense "information" by reason of some special relation to the Government, also failed to elucidate "not entitled."[328] Presumably, the phrase was understood to refer to orders from government superiors about the propriety of disclosing defense information. So long as the espionage offenses concerned protected places and information in the hands of government employees, it seems only common sense that effectuation of the entitlement concept should come through orders of executive branch officials in charge of the given place or document.

The Espionage Act of 1917 introduced substantial ambiguities. Subsection 1(d), read literally, prevented disclosures by persons outside government employment, and thus not generally subject to executive rules;[329] consequently the issue of what determines entitlement became more perplexing. One possible meaning was that a citizen should not transfer government defense secrets to another unless the recipient was expressly authorized to have it. It was, however, precisely the spectre of such a construction that led Senator Cummins to protest so vigorously against the entitlement language, and his apprehensions were repeatedly met by assurances that no such construction was feasible. A person could become "not entitled to receive" information, the sponsors of the 1917 Act indicated, only if a statute or order so specified.[330]

Assuming that statutes or orders are necessary to negate entitlement, one's expectation would be that the legislation would spell out the authority by which the statutory proscription might be given effect. The usual pattern would be a statutory prohibition against communication of a secret to one "not entitled to receive it"; an express grant of the authority to define "not entitled"; and finally, implementation through orders and regulations issued by the person so authorized. The espionage laws, however, do not deal with entitlement in such a clearcut fashion. It will be recalled that the 1917 Act, as originally conceived by the Wilson Administration, would have defined entitlement explicitly. Section 6 of S. 8148 would have granted the Executive the power to designate information as secret, after which only officials duly authorized by Presidential order would be "entitled to receive it." Thus, the traditional pattern was initially contemplated and in fact survived all the

328. *See* text following note 184 *supra.*

329. Subsection 1(d) applied to person "lawfully or unlawfully having possession of" any tangible item relating to the national defense.

330. *See* text following note 196 *supra.*

debates, only to be cut, without explanation, in conference. The consequence of its elimination was that nothing in the 1917 Act delegated authority to the President, or anyone else, to formulate rules about entitlement for any purposes.

The 1950 amendments brought no clarification. Congress might easily have indicated, for example, that the executive classification program was to be used in connection with subsections 793(d) and (e). The same Internal Security Act contained the provision, now codified at 50 U.S.C. § 783(b), that makes criminal the transmission by a government employee of classified information to a foreign agent.[331] Section 798 of the espionage chapter, enacted a few months earlier, made criminal communication or publication of classified information concerning communications intelligence operations.[332] Thus, Congress knew about the classification system, and was willing to have prohibitions of narrow scope turn on it. Nevertheless, the only hint in all the 1950 legislative record that "not entitled" might be given content by the classification system was the comment of Chairman Celler that "we cannot allow . . . valuable classified and other information, data, and records vital to our security . . . used and disseminated to our grave discomfort." None of the statements of the Executive proponents of the 1950 legislation, none of the committee reports, and nothing else in the 1950 debates on the 793 revision, so far as we are aware, suggests that the effect of 793(d) and (e) would be to put criminal sanctions behind the classification system.

Although Congress did not expressly refer to the classification system, there is nonetheless a strong temptation to turn to it as a source of meaning for "not entitled," largely because no alternative source of meaning seems available. It would, however, be strange to imply Presidential authority to determine those not entitled to receive information when an express grant of that power, section 6, was eliminated from the 1917 Act and no similar provision has ever been adopted. Furthermore, the proposition that the President, without statutory authority, can regulate the exchange of defense information by private citizens runs directly counter to the dominant concerns expressed in the 1917 debates, the only time the entitlement concept has received the explicit attention of Congress.

A second objection to the use of classification as a guide is that even if Presidential power to define entitlement could be implied, no President has ever exercised it with any clarity or confidence. The classification system as we know it was established in 1951,[333] after the revision of 793(d) and (e)

331. *See* text accompanying note 403 *infra*.

332. *See* text following note 370 *infra*.

333. General discussions of the history of the system of Executive classification appear in *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1189-1243 (1972) [hereinafter cited as *Developments*]; Parks, *Secrecy and the Public Interest in Military Affairs*, 26 GEO. WASH. L. REV. 23, 46-77 (1957); REPORT OF THE COMMISSION ON GOVERNMENT SECURITY [hereinafter cited as

into their present form, by Executive Order 10290.[334] This Order contained nothing aimed at implementing the statute's "not entitled" concept. Nothing suggests that the Order presumed to regulate transfers of information from citizen to citizen; quite the contrary, in purely hortatory language, the Order merely "requested" all citizens to "observe the standards . . . and join with the Federal Government . . . to prevent disclosure."[335]

Moreover, while it is clear that the Order was intended to instruct government employees not to transfer classified information to citizens, the only possible indirect implementation of the entitlement concept, whereby 793(d) and (e) might place criminal sanctions behind such disclosures, was a circuitous reference to sections 793 and 794 in a required classification stamp:

> When classified security information affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the Executive Branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:
> This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C. Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law.[336]

Notice the deviation from the statutory language: whereas 793(d) and (e) make criminal transmission of defense information to persons "not entitled to receive it," the classification notice states that revelation to "an unauthorized person is prohibited by law." Was the intention to shift the meaning of entitlement from "not prohibited" to not "positively authorized"? Nothing else in the Order referred even obliquely to the espionage statutes, or to the meaning of "entitlement" in the context of 793(d) and (e). One provision did note that "no person shall be entitled to knowledge or possession of, or access to, classified security information solely by virtue of

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REPORT] pp. 151-172 (1957). There have been numerous Congressional hearings devoted to the classification system. *See, e.g., Commission on Government Security, Hearings on S. J. Res. 21 Before the Subcomm. on Reorganization of the Senate Comm. on Government Operations*, 84th Cong., 1st Sess. (1955); *U.S. Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcomm. of the House Comm. on Government Operations*, 92nd Cong., 1st Sess. (1971). It is remarkable that all these discussions skirt the basic question of whether revelation of properly classified material is a crime.

334. 16 Fed. Reg. 9795 (1951). Indeed, section 1(b) of the Order's Regulations states: "Nothing in these regulations shall be construed to replace, change, or *otherwise be applicable* with respect to any material or information protected against disclosure by any statute." *Id.* at 9795.

Prior to 1951, the classification program existed within the Departments of the Army and Navy, having been created in 1917. *Developments* at 1193. The military classification program was first extended to civilian departments by President Truman in 1951 by Exec. Order No. 10290.

335. Preamble to Exec. Order No. 10290, *id.*

336. Exec. Order No. 10290, section 32(4)(c), *id.* at 9800. A similar stamp was used in the Army classification system, having first been utilized in 1935. *Developments* at 1194-95.

his office or position,"[337] but it was clearly designed simply to refute any implied entitlement throughout the Executive Branch and to ensure that only officials having a "need to know" classified information in order to perform their official duties would have access to it.[338] The next subsection of the Order stated that "[c]lassified security information shall not be discussed with or in the presence of unauthorized persons, and the latter shall not be permitted to inspect or have access to such information."

Superceding executive orders provide no clarification of the classification system's effect on the entitlement language of 793(d) and (e). Executive Order 10501, issued in 1953, included a virtually identical classification stamp for material furnished to persons outside the Executive Branch,[339] but contained no other provisions looking to the possibility of criminal sanctions for disclosure of classified "information" to unauthorized persons.[340] The text of Executive Order 11,652, the current Order governing classification, contains no reference to the classification stamp, although the preamble does state: "[w]rongful disclosure of [classified] information or material is recognized in the Federal Criminal Code as providing a basis for prosecution."[341] With respect to unauthorized disclosures by federal employees, the Order states:

> The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.[342]

The Order is searched in vain for any explicit implementation of the "entitlement" language of 793(d) and (e), or any assumption that criminal sanctions are applicable to any and all unauthorized disclosures of properly classified defense information.

The Order did authorize the National Security Council to issue directives governing the marking of classified material. The NSC implementing directive requires classified information (other than "restricted data" under the Atomic Energy Act of 1954) to display the following warning:

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337. Exec. Order No. 10290, section 29(a), *id.* at 9799.

338. The Order limits dissemination of classified information within the Executive Branch "to persons whose official duties require knowledge of such information." Section 30(a), *id.* at 9799. Section 29(b), *id.* at 9799.

339. 18 Fed. Reg. 7049 (1953). The classification stamp appears in section 5(i), *id.* at 7052.

340. Similar to the earlier Order, Exec. Order No. 10501 states that "[k]nowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy." Section 7, *id.* at 7053.

341. Exec. Order No. 11652, 37 Fed. Reg. 5209 (1972).

342. Section 13(B), *id.* at 5218.

"NATIONAL SECURITY INFORMATION"

Unauthorized Disclosure Subject to Criminal Sanctions.[343]

These Executive Orders establishing the modern classification system are not easily construed as giving meaning to the entitlement language of 793(d) and (e) since no provision expressly defines the term. The obfuscation in the Orders as to the relevance of the criminal sanctions for breach of classification can only be purposeful; the latest Order, for example, is even less straightforward than its precursors in that it omits explicit reference to the espionage statutes.

Statutory authority for the classification program is not express. The Executive Branch, however, rightly claims that authority is implicit in a number of statutes. The Commission on Government Security, established by Congress in 1955 to review the federal loyalty and security program, found authority for the classification system in several statutes.[344] Significantly, the Commission did not mention sections 793 or 794, even though by citing sections 795 and 798 it demonstrated awareness of the espionage statutes.[345] Furthermore, numerous Executive summaries of classification problems manifest a belief, generally regretted, that violation of the classification system is not a criminal offense.[346] The Government Security Commission "found to its dismay" that unauthorized disclosure of classified information without subversive intent is "not amenable to applicable criminal statutes or other civil penalties" for persons "removed from Government Service."[347]

A number of legislative proposals have been introduced since 1950 that can only reflect the assumption that the espionage statutes do not prohibit non-culpable disclosure of properly classified information. Whether the lack of coverage was seen as stemming from the problems of giving meaning to the

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343. 37 Fed. Reg. 10053, 10059 (1972).

344. REPORT at 158. *See also, Developments* at 1198.

345. REPORT at 158-59.

346. *See, e.g.*, statement of William Florence, *Pentagon Papers Hearings* at 195; Morrison, *The Protection of Intelligence Data:*

> An individual who simply reveals to the public at large classified data is for all practical purposes immune from prosecution since his defense, of course, would be that he thought the American public had a right to know and the Government would not be able to prove intent to aid a foreign government or to harm the United States. The fact that any reasonable man would know that revelation to the general public ipso facto reveals to foreign governments is immaterial. Even if the one making the exposure is a government employee well versed in the rules governing classified information, there can be no presumption of intent which would bring him within the terms of present espionage laws.

(unpublished paper on file in the Columbia Law Library) (Morrison was Assistant General Counsel of the C.I.A. when this paper was written); Miskovsky, *The Espionage Laws*, pp. 15 *et seq.* (unpublished paper on file in the Columbia Law Library) details the numerous proposals by Executive Departments to deal with the perceived inadequacy of the espionage statutes to protect classified information from unauthorized disclosure. *But see* statement of William Tompkins, *Hearings before a Subcomm. on Reorganization of the Senate Committee on Govt. Operation*, 84th Cong., 1st Sess. 63 (1955).

347. REPORT at 619-620.

entitlement concept is not clear. Other reasons for the proposals may have been the notion that all the espionage statutes, including 793(d) and (e), require a showing of purpose to injure the United States or advantage a foreign nation, or that proof of defense-relatedness would compromise the security interests of the classification program. Yet, if the only problem with current statutes were proof of defense-relatedness, one would expect the subsequent proposals to have been justified in terms of that legislative purpose. They have not been so justified.

Perhaps the most significant of these proposals, that of the Government Security Commission, would have made unauthorized disclosure of classified information a crime.[348] The measure made no progress at all in Congress,[349] and was abandoned by the Executive as politically untenable.[350] A similar proposal had been advanced in 1946 by the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack.[351] It was severely cut back by the Judiciary Committees and wound up as the current section 798 of Title 18 which prohibits disclosure of the narrow category of classified communications intelligence information.[352] In 1962, Senator Stennis introduced a bill to amend section 793 to make disclosures of classified information a crime, without any narrow intent requirement.[353] The proposal was not enacted. If the classification system were thought to be protected by criminal sanctions against "willful" disclosure of defense-related information, it is remarkable that two Commissions and a Senator knowledgeable about the laws relating to national security would have seen a need for these proposals.

The relationship of the classification system to sections 793(d) and (e)'s "not entitled to receive it" formulation is thus unclear in three basic respects. First, Congress has not expressly authorized the President to define who is "entitled to receive" defense information. Furthermore, neither the statutes, the legislative history, nor the acts of the President support or point to the exercise of any such implicit authority. Second, even if "entitled to receive it" may be given meaning by Executive Order despite the deletion of express authority to define the phrase, its construction must be guided by the understanding of Congress. During the debates on S. 8148 Congress manifested an understanding that a person was "not entitled" only if a statute or valid order precluded his acquisition of particular information. Therefore, we cannot equate "not entitled" to receive with "not affirmatively authorized" to receive. Even assuming that the President has implicitly been granted authority to

348. REPORT at 619-20. The Commission's proposed statute is set out *id.* at 737.

349. Senator Cotton introduced a bill, S. 2417, in the 85th Congress, to implement this proposal of the Commission, but the bill was never reported favorably by the Senate Judiciary Committee.

350. *See* Miskovsky at 23.

351. *See* note 381 *infra.*

352. The legislative history of section 798 is discussed at text following note 373 *infra.*

353. 108 CONG. REC. 23140-41 (1962).

define the terms—and assuming such delegation of power to control the speech of ordinary citizens could survive attacks on the grounds of vagueness and overbreadth—serious questions would remain whether the authority has been effectively exercised. The Executive has nowhere asserted that communication of classified information to a person not authorized by Executive regulations to receive it is a crime. The "classification stamps" are at most circuitous references to penal sanction that hardly bespeak Executive confidence that its rules and regulations give meaning to the entitlement concept. Finally, legislation has been offered from authoritative sources that proceeds on the assumption that 793(d) and (e) do not make simple disclosure of defense information a crime. Congress has always refused to enact such proposals to put criminal sanctions of general scope behind the classification system.

These confusions, in our opinion, vitiate whatever force there may be to the argument that because reference to the classification system is the only way to give meaning to the entitlement concept, subsections 793(d) and (e) should be interpreted to make criminal any communication of defense documents or information to persons unauthorized to receive it pursuant to the classification system. Reading the classification program into the "not entitled to receive it" phrase of subsections 793(d) and (e) would accomplish precisely what Congress has refused to do.

5. *Summary.* Subsections 793(d) and (e) remain mysterious even after patient efforts to analyze the legislative record that has produced them. To accord with the dominant theme of legislative intention, the culpability standard "willfully" must be imbued with a meaning which reflects the general substance of Senator McCarran's anti-censorship provision of the 1950 Act. Only by this straining of the statutory language can the legislative purpose of not enacting sweeping prohibitions on publication of defense information be respected. Moreover, a more conventional reading of "willfully" almost certainly leaves these statutes overbroad in the first amendment sense.

We doubt that reading "willfully" to save these statutes is worth the strain. The evidence is compelling that Congress ceased to have any real understanding of these statutes after 1) the provisions were broadened beyond the 1911 Act's prohibitions applicable to military places and government employees, 2) the provision which would have implemented the entitlement language was struck from the bill without explanation, and 3) Congress demonstrated by the narrowing and ultimate rejection of the Wilson Administration's broad proposed prohibition on publication of defense information that it did not intend to enact prohibitions on publication or communication motivated by the desire to engage in public debate or private discussion. The only time these provisions drew sustained legislative attention was during consideration of S. 8148, when the Senate of the 64th Congress proved itself overwhelmingly acquiescent to the Wilson Administration's interlocking

proposals for broad information controls. As the more clearcut of these proposals went down to defeat in the 65th Congress, the vague and baffling provisions now codified in 793(d) and (e) survived intact, due to a combination of inadvertence in the Senate and understood narrow scope in the House. The 1950 revision exacerbated the confusion, at once making clear the applicability of the provisions to ordinary citizens as well as government employees, and reaffirming the inapplicability of the statute to publication of defense information. On top of this evidence of legislative confusion, there is the absence of any forthright executive action to implement the provisions' entitlement language, and the refusal of later Congresses to adopt broader prohibitions on disclosure of classified information. The only reading of these provisions which is faithful to the legislative history would leave them accomplishing almost nothing not already covered by subsection 794(a) or the other subsections of 793. In these circumstances, courts should hold these provisions not applicable to communication or retention activities incidental to non-culpable revelation of defense information. Whether the courts should go further, and hold these statutes unconstitutionally vague across the board for the confusion surrounding the entitlement concept is a difficult question, but on balance we see little worth preserving in these two remarkably confusing provisions.

VI. Subsection 793(c)

Subsection 793(c) is yet another instance of Congress's enacting espionage legislation which if read literally may make criminal a considerable range of conduct pertaining to public debate. The statute provides:

> (c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter . . . .[353a]

As with subsections 793(d) and (e), the principal determinant of the statute's scope is the culpability required to violate it. That issue in turn depends on construction of "for the purpose aforesaid," a reference to the culpability standard of 793(a). Subsection 793(a) commences:

> Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon . . . .

353a. *See* 18 U.S.C. § 793(c) (1970).

Subsection 793(b) begins:

> Whoever for the purpose aforesaid, and with like intent and reason to believe, copies . . . .

In subsection 793(b) the words "purpose aforesaid" clearly mean only the purpose of obtaining information "respecting the national defense." Insofar as the same words "purpose aforesaid" are used in subsection (c), the argument is strong that they have the same meaning as in subsection 793(b). Such a construction permits conviction regardless of whether the actor intended or expected any harm to United States interests to result from his conduct.

Although this reading of subsection (c) is strongly supported by the statute's structure and drafting history,[354] apparently no one understood it that way. The assumption has been that the same culpability was required to violate subsection (c) as subsections (a) and (b). Thus, the single clear reference to subsection (c) in the 1917 Senate debates is Senator Sterling's comment in passing that "intent or reason to believe" is an element of the crime.[355] Similarly, the 1950 House report on the proposed amendments to section 793 states expressly that subsection (c) requires the prosecutor to prove wrongful intent;[356] and the same position was taken by the Legislative Reference Service in their response to Senator Kilgore.[357] In the absence of indication that subsection (c) has ever been thought by Congress to be of greater reach than subsections (a) and (b), we think it appropriate that the statute be given that gloss, even though such an interpretation is imaginative in view of the statutory language.

If this position is rejected, however, then the sweep of subsection 793(c) depends upon numerous other issues. First, it clearly prohibits receipt of tangible items only; regardless of whether oral revelation of the contents of a document is a communication, transmittal or delivery of it, certainly the person who simply listens does not thereby receive a document. Second, subsection (c) prohibits the receipt of documents or notes only when the actor knows of

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354. Section 1 of S. 8148 as first introduced contained these provisions:
(a) whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, . . .
(b) whoever, for the purpose aforesaid, and without lawful authority, . . .
(c) whoever, for the purpose aforesaid, . . .
The placing of the commas indicates that a purpose to obtain was a common element of the three proposed offenses, with non-entitlement, absence of lawful authority, and knowledge or belief that the Espionage Act had been or would be violated as three distinct requirements. See 54 Cong. Rec. 2820 (1917). When S. 2 was introduced, "intent or reason to believe" was substituted for entitlement in § 1(a), and "without lawful authority" in § 1(b). 55 CONG. REC. 778 (1917). Nothing was done to § 1(c).
In the House, on the other hand, all the gathering offenses required the same intent to injure the United States. Insofar as the House believed that § 1 as adopted effected no "material change" in H.R. 291's scope, § 1(c)'s language ought not to be pressed in the face of legislative confusion.

355. 55 CONG. REC. 2064 (1917).

356. *See* text at note 247, *supra*.

357. *See* text at note 251, *supra*.

past or intended breaches of the espionage laws, bringing into question the reach of the other statutes. If subsections 793(d) and (e) are construed not to apply to participants in public debate, then subsection (c) has little impact on publications of defense secrets. If, however, subsections (d) and (e) are read to make any such disclosures criminal then subsection (c) makes the receipt of any tangible item that may be characterized as a "document" or "note" a criminal offense, even though no conspiratorial relationship of any sort exists between the recipient and the person who first disclosed.[358]

VII. Other Statutes Bearing on Publication of Defense Information

In addition to sections 793 and 794, several other provisions, aimed either at narrow categories of especially sensitive information or at particular classes of actors, govern dissemination of information relating to national security. Indeed, if our understanding of the interpretation to be given sections 793 and 794 is correct, the narrower statutes constitute the only effective statutory controls on publication of defense information and preliminary retentions and communications leading up to publication. Furthermore, given the confusions of language and history in sections 793 and 794, later statutes that reflect Congress' understanding of the two general sections are valuable aids in interpreting them.

A. *18 U.S.C. § 952*

Section 952 of Title 18 prohibits revelation by federal employees of any matter that has been transmitted in the diplomatic code of a foreign country. Although it is far narrower than the Espionage Act of 1917, the section evidences a characteristic congressional balancing of the need for secrecy and the interest in dissemination of news. Section 952 provides:

> Whoever, by virtue of his employment by the United States, obtains from another or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, or which purports to have been prepared in any such code, and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.[359]

The statute was passed in response to the publishing activities of Herbert

358. For example, if the Pentagon Papers were national defense documents, and if *Heine* is read narrowly so that information the Government has sought to suppress does not lose its defense-related character despite its disclosure, and if verbatim copies are "documents," then every person who bought the New York Times to read them violated 18 U.S.C. § 793(c).

359. 18 U.S.C. § 952 (1970).

O. Yardley, a former director of the division of the State Department charged with breaking the diplomatic codes of other nations.[360] The division was disbanded in 1929, apparently on the quaint notion that code-breaking was unethical during peacetime. In the same year, after leaving the Government, Yardley wrote a book entitled "The American Black Chamber," which described the Department's code-breaking procedures and included translations of coded dispatches sent by the Japanese Government to its representatives at the 1921 Disarmament Conference. Publication of these dispatches apparently embarrassed relations between the United States and Japan, and, perhaps more significantly, allegedly caused the Japanese Government to adopt a new code system and to tighten security with respect to cryptographic procedures. In late 1932, the State Department learned that Yardley had completed a second manuscript. Fearing that the second book might contain more decoded dispatches and might further disrupt relations with Japan on the eve of the 1933 International Economic Conference, the Department quickly submitted a bill to prevent the publication of decoded messages sent by a foreign government.

The Department's proposed legislation, H.R. 4220[361] went considerably

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360. Yardley is probably better known to students of the laws of chance than students of the law of espionage. Subsequent to the *The American Black Chamber*, Yardley wrote *The Education of a Poker Player* which has become a classic in the literature concerning speculation on the turn of a card. Yardley's central role in the adoption of section 952 is reflected in Cong. Celler's statement. 77 CONG. REC. 5333 (1933).

361. H.R. 4220 provided:

> That whoever, by virtue of his employment by the United States, having custody of, or access to, any record, proceeding, map, book, document, paper, or other thing shall, for any purpose prejudicial to the safety or interest of the United States, willfully and unlawfully conceal, remove, mutilate, obliterate, falsify, destroy, sell, furnish to another, publish, or offer for sale, any such record, proceeding, map, book, document, paper, or thing, or any information contained therein, or a copy or copies thereof, shall be fined not more than $2,000 or imprisoned not more than three years, or both, and moreover shall forfeit his office and be forever afterwards disqualified from holding any office under the Government of the United States.
>
> SEC. 2. Whoever shall willfully, without authorization of competent authority, publish or furnish to another any matter prepared in any official code; or whoever shall, for any purpose prejudicial to the safety or interest of the United States, willfully publish or furnish to another any matter obtained without authorization of competent authority, from the custody of any officer or employee of the United States or any matter which was obtained while in process of transmission from one public office, executive department, or independent establishment of the United States or branch thereof to any other such public office, executive department, or independent establishment of the United States or branch thereof or any matter which was in process of transmission between any foreign government and its diplomatic mission in the United States; or whoever shall for any purpose prejudicial to the safety or interest of the United States, willfully, without authorization of competent authority, publish, or furnish to another, any such matter or anything purporting to be any such matter, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> SEC. 3. In any prosecution hereunder, proof of the commission of any of the acts described herein shall be prima facie evidence of a purpose prejudicial to the safety or interest of the United States.

The proposal is set out in the Report of the House Judiciary Committee, which recommended passage without any effort to analyze the scope of the proposal. H.R. REP. No. 18, 73rd Cong., 1st Sess. (1933).